112-207

No. 1056.

IN THE

Supreme Court of the United States.

JOHN FOSTER *vs.* THE STATE OF KANSAS,
Ex. Rel. W. A. Johnston, Att'y-Gen'l.

RULE TO SHOW CAUSE.

W. HALLETT PHILLIPS,
For Rule.

In the Supreme Court of the United States.

JOHN FOSTER *vs.* THE STATE OF KANSAS.

RULE TO SHOW CAUSE.

The writ of error in this case directed to the Supreme Court of Kansas, was allowed by Mr. Chief Justice Waite, at Washington, April 5, 1884, and on the same day a bond was approved by him, to operate as a *supersedeas* of the judgment.

This judgment was rendered by the Supreme Court of Kansas, April 1, 1884, and adjudged that the defendant Foster be ousted from the office of county attorney for Saline County, Kansas. No process was issued on this judgment. The proceeding was one of quo warranto, in the name of the state, on the relation of the Attorney General.

On the day the writ of error and *supersedeas* were allowed, to wit, April 5, counsel at Washington telegraphed the fact of such allowance to the counsel in Kansas. The next day was Sunday. On Monday the 7th, counsel called upon the judge of the district court of Saline County, and exhibited the telegram, and notified him that the

proceedings to oust the said John Foster were stayed by the allowance of the writ of error and approval of the bond. MOTION PAPERS 5

On the midnight of the 7th April, the judge appointed Joseph Moore, county attorney, in place of Foster, "it having appeared to me by a record of the Supreme Court that there is a vacancy in the office of county attorney," p. 9.

Moore was acquainted with the fact of the allowance of the writ and the approval of the bond before the appointment.

The bond of the new attorney was accepted on April the 8th, and thereupon he assumed to discharge the duties of the office.

On that day the bond and writ of error arrived, and were filed in the office of the clerk of the Supreme Court of the state. Original Rec., 1.

On the 26th May, Mr. Justice Miller granted a rule directing Joseph Moore to show cause before this court on the second Monday of October next, why he should not be attached for contempt in violating the *supersedeas*.

We contend that the allowance of the writ of error and acceptance of the bond, operated to stay all proceedings under the judgment.

The appointment of Moore after the date of such allowance was nullity, and Moore by accepting the appointment and undertaking to discharge the functions of the office, acted in gross violation of the *supersedeas*.

Unless we are correct in this position, the *supersedeas*

granted was a mere mockery. Its whole object was to prevent the plaintiff in error from being dispossessed of the office pending the writ of error.

By the 23d section of the judiciary act it is provided that a writ of error shall be a *supersedeas*, and stay execution in cases only where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sunday exclusive, after rendering the judgment or passing the decree complained of, until the expiration of which term of ten days, executions shall not issue in any case where a writ of error may be a *supersedeas*. This section is incorporated in Sec. 1007, R. S., as amended. Under that section a party is allowed to give security within sixty days, or afterwards with the permission of a judge of the appellate court.

By section 25, the judgment of the highest court of a state may be re-examined by this court, "in the same manner, and under the same regulations, *and the writ shall have the same effect* as if the judgment had been passed in a circuit court." 1 St., 85.

This provision is re-enacted in Sec. 709, R. S.

It has been construed by this court as making applicable to writs of error to state courts all the provisions of law providing for writs of error to the circuit courts, as respects the writ, the finality of the judgment, the limitation, the security, and the *supersedeas*.

Thus in Green *vs.* Van Buskirk, which came here under the 25th section, an order for execution on a judgment was entered, notwithstanding the plaintiff in error had obtained a *supersedeas*, within ten days after judgment.

On application of the plaintiff in error, this court ordered a writ of *supersedeas* to issue.

The Chief Justice delivering the unanimous opinion of the court says:

"The unsuccessful party had ten days from that entry (of judgment) to take out a writ of error and make it a *supersedeas;* and he duly availed himself of this right by service of the writ of error on the 30th of February, 1866, and giving the required bonds."

Green *vs.* Van Buskirk, 3 Wall 447.

And so in the Slaughter House cases the court say: "Writs of error issued under the twenty-fifth section of the judiciary act have the same effect as if the judgments or decrees were rendered in a circuit court, and they operate as a *supersedeas*, and stay execution only where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, from the date of the judgment or decree."

Slaughter House Cases, 10 Wall, 291.

By the act of 1803, Sec. 1012 R. S., "appeals from the circuit court shall be subject to *the same rules, regulations*, and *restrictions*, as are prescribed in cases of writs of error."

The language of this provision, essentially the same as that contained in the act of 1789, has always been construed by this court as embracing the granting of the *supersedeas* and the stay of execution for ten days.

Stafford *vs.* Union Bank, 16 H, 139.

Adams *vs.* Law, 16 H, 148.

If this ten days' stay is applicable to appeals as a *regu-*

lation of the writ of error, upon what ground can it be held not to be a regulation of the writ of error in cases coming from the state courts? In both instances it regulates the effect of the writ or appeal as a *supersedeas*.

We would confidently submit this view, were it not for the fact that this court, in the recent case of Doyle *vs.* Wisconsin has declared that the provision in the act of 1875, re-enacting the stay of ten days contained in the act of 1789, has reference only to the courts of the United States.

94 U. S., 40.

No reference is made in the opinion of the court to the previous decisions. We submit that it cannot be reconciled with those decisions, nor with the long settled practice of the court.

The writ of error and bond in the case at bar were allowed and filed within the ten days, and if we are right in our position, were effectual to operate as a *supersedeas*. It would follow that within the ten days no action could be taken under the judgment, and that the action complained of was without warrant of law.

But should the court hold that there was no stay of execution for the ten days, the question would remain as to the time when the *supersedeas* become effective.

Was it effective from the time of its allowance, or did the writ of error only stay execution from the time it was filed in court?

The papers filed with this motion show that the judge below, and the party who now shows cause were in-

formed that a *supersedeas* had been allowed, before the judge took action in appointing a successor to Mr. Foster. The order was made at midnight, in order that it might anticipate the filing of the bond and writ of error.

These papers, as we have stated, were filed on the same day the party appointed *qualified*.

The justices of this court have the power to allow writs of error to state courts. They have also the power to make such writs effectual to stay proceedings.

If after an allowance of a writ of error and the approval of the board, the state court can immediately issue execution, such writs of error will afford but little remedy to the suitor.

By the law of Kansas, the *supersedeas* arises and operates to stay execution, upon the approval of the bond by the court.

Revised Laws, Kan. § 554.

In Board of Commissioners *vs.* Gorman, no bond having been given within the ten days from judgment, execution issued. The plaintiff in error gave bond within sixty days.

A motion was made that a writ should issue from this court to restore the plaintiff in error to the office, from which he had been ousted under the execution.

The contention was that under the act of June 1, 1872, a party had sixty days within which to give the bond, and that no execution could issue during that period.

This court, however, held, that under the act there was only an absolute stay of execution for ten days from judgment; that although a bond might be given within the sixty days, the *supersedeas* only dated from the time of the approval and filing of the bond.

In that case the execution had issued prior to the filing of the bond, and no notice was given that any had been approved. It nowhere appeared from the record when the bond was approved.

The court held that under these circumstances the court of error operated as a *supersedeas*, only from the filing.

The case came from a territorial court.

19 Wall, 662.

It may be suggested that this court cannot reach the action complained of inasmuch as the writ of error is directed to the judgment of the Supreme Court of the state.

The judge of the district court of Saline County, however, has the power of filing vacancies in the office of county attorney.

He made the appointment of Moore on the ground that a vacancy had been declared by the very judgment of the supreme court of the state, which was superseded.

His action was in direct execution of that judgment, and the action of Moore in accepting the appointment and performing the function of county attorney, was in contempt of the process of this court.

The object of the present proceeding is to enforce the *supersedeas*.

If the plaintiff in error has mistaken his remedy, we ask that the court should grant such a writ as they may judge appropriate.

We submit that the attachment asked for should be granted.

W. HALLETT PHILLIPS,
For Rule.

In the Supreme Court of the United States.

To Joseph Moore, Saline County, Kansas:

You are hereby admonished to appear in the Supreme Court of the United States on the second Monday of October next, to show cause, if any you have, why you should not be attached for a contempt in violating the *supersedeas* which arises from the allowance of the writ of error, and filing the same with the Supreme Court of the State of Kansas, in the case of the judgment against John Foster, county attorney of Saline County, Kansas, in the suit of the State of Kansas on the relation of the Attorney General.

Dated at Washington, D. C., this 26th day of May, 1884.

SAM. F. MILLER,
Justice Supreme Court United States.

SALINA, SALINE COUNTY, KANSAS,
June 9th, 1884.

Received the within writ from John Foster this 9th day of June, 1884, and served the same by exhibiting the original and delivering a certified copy to said Joseph Moore, and also a certified copy to J. H. Prescott.

B. F. SIMPSON,
United States Marshal, by L. M. Tuttle, Deputy.

The following are the papers before Justice Miller at the time of issuing the above writ:

THE STATE OF KANSAS,
County of Saline, ss:

John Foster, being duly sworn according to law, deposes and says that he is and has been since the 8th day of January, 1883, the county attorney of Saline County, Kansas, and during that time has been in possession and now is in possession of all the books, papers, and furniture of said office. (A certified copy of affiant's bond and oath of office is attached to this affidavit marked "A.")

That he is the plaintiff in error in the case now pending in the Supreme Court of the United States, wherein John Foster, county attorney of Saline County, Kansas, is plaintiff in error, and The State of Kansas on the relation of W. A. Johnston, attorney-general, is defendant in error. Affiant knows by information and evidence that one Joseph Moore, on or about the 7th day of April, 1884, was, by one John H. Prescott, judge of the district court of Saline County, Kansas, pretended to have been appointed as the county attorney of said county; that said Joseph Moore has, in some matters of filing informations in cases of misdemeanors in the said district court, acted as such county attorney, and now claims the right to act in a general way by reason of said appointment in all matters appertaining to said office of county attorney.

That said Joseph Moore is, as affiant of his own personal knowledge knows, insolvent, and that no debt for said salary can be of him collected; that the said Judge John H. Prescott is now and has for years been the bitter, personal, and judicial enemy of affiant.

That said Joseph Moore has not demanded of affiant the possession of any book, paper, or furniture appertaining or belonging to said office of county attorney.

JOHN FOSTER.

Subscribed to in my presence and sworn to before me, this 20th day of May, 1884.

[L. S.] E. E. BOWEN,
Notary Public.

Term ends February 14, 1887.

A.

Know all men by these presents: That we, John Foster as principal, and August J. Holmquist, J. T. Wells, Aug. Engstrom, Peter Mugler, S. Gradwoll, N. F. Carroll, A. A. Wise, J. H. Wolsieffer, B. A. Litowich, Wm. Berg, Fred. Baier, F. Kingman, W. T. Houser, Edward Smith, Flumerfelt & Williams, R. H. Dihle, A. L. Dodge, G. F. Moore, R. Markland, T. A. Williams and James J Purcell as sureties, are held and firmly bound unto the State of Kansas in the penal sum of $2,000 lawful money of the United States, to be levied of our goods and chattels, lands and tenements, if default be made in the conditions hereinafter mentioned.

The conditions of this bond are such that, whereas the said John Foster was elected to the office of county attorney for the County of Saline, in said State, on the 7th day of November, A. D. 1882.

Now, if the said John Foster shall faithfully perform his duties as such officer and shall pay over to the County Treasurer of said county in the manner prescribed by law all moneys which shall come into his hands by virtue of his office, then this obligation shall be void, otherwise to be and remain in full force and effect in

law. Witness our hands and seals this 27th day of November, A. D. 1882.

JOHN FOSTER,	[SEAL.]
A. J. HOLMQUEST,	[SEAL.]
J. T. WELLS,	[SEAL.]
AUG. ENGSTROM,	[SEAL.]
PETER MUGLER,	[SEAL.]
S. GRADWOLL,	[SEAL.]
N. F. CARROLL,	[SEAL.]
A. A. WISE,	[SEAL.]
J. H. WOLSIEFFER,	[SEAL.]
B. A. LITOWICH,	[SEAL.]
WM. BERG,	[SEAL.]
FRED. BAIER,	[SEAL.]
F. KINGMAN,	[SEAL.]
W. T. HOUSER,	[SEAL.]
EDWARD SMITH,	[SEAL.]
FLUMERFELT & WILLIAMS,	[SEAL.]
R. H. DIHLE,	[SEAL.]
A. L. DODGE,	[SEAL.]
G. F. MOORE,	[SEAL.]
R. MARKLAND,	[SEAL.]
T. A. WILLIAMS,	[SEAL.]
JAS. J. PURCELL,	[SEAL.]

THE STATE OF KANSAS,

County of Saline, ss:

I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Kansas, and faithfully discharge the duties of the office of county attorney of said Saline County, so help me God.

JOHN FOSTER.

Sworn and subscribed to before me this 30th day of November, A. D. 1882.

[SEAL.] JOSEPH SARGENT,
Clerk County

(Endorsed:) John Foster. State of Kansas, County of Saline, ss: Filed December 1, 1882. Jos. Sargent, County Clerk. Approved December 1, 1882. Joseph Sargent, County Clerk. Filed for record January 4, 4 p. m., 1883, and entered in official record, on page 101. Ed. Wittman, register. Ct., 1.00.

STATE OF KANSAS,
County of Saline, ss:

I, Joseph Sargent, county clerk of said county and State, do hereby certify that the above and foregoing is a true and correct copy of the original bond and official oath of John Foster as county attorney as filed in my office with all the indorsements thereon.

Witness my hand and official seal this 20th day of May, 1884.

[L. S.] JOSEPH SARGENT,
County Clerk.

THE STATE OF KANSAS,
Saline County, ss:

Charles A. Hiller, of lawful age, being first duly sworn upon his oath, says that on the 6th day of April, A. D. 1884, he received from Thos. P. Fenlon and John Foster a telegram signed by them informing him that a writ of error had been allowed and bond approved by the Hon. Chief Justice of the Supreme Court of the United States, in a case before that time pending in the supreme court

of Kansas, wherein The State of Kansas on the relation of W. A. Johnston, attorney-general, against the said John Foster; and on the 7th day of April, A. D. 1884, he called upon the Hon. John H. Prescott, judge of the district court of Saline County, in said State of Kansas, as one of the attorneys of said John Foster, informed him of the contents of said telegram, and showed him the original telegram and notified him that proceedings to oust the said John Foster were stayed by the writ of error and the allowance of the *supersedeas* bond and its approval, and urged him to do no act hastily in the matter of making an appointment of a county attorney.

This happened about 5 o'clock in the afternoon of the said 7th day of April, A. D. 1884.

CHARLES A. HILLER.

Sworn and subscribed before me this 19th day of May, A. D. 1884.

[L. S.] E. H. GIBBS,
Notary Public.

Term ends March 25, 1885.

THE STATE OF KANSAS.
County of Saline, ss:

H. D. Baker, being first duly sworn according to law, deposes and says that he is and was, on the 7th day of April, A. D. 1884, the under-sheriff of Saline County, Kansas; that he had before the said 7th day of April, 1884, learned that telegrams had been received by C. A. Hiller and W. H. Johnson, residents of Salina, in said county, to the effect that the Hon. Chief Justice Morrison R. Waite, of the Supreme Court of the United States, had granted a writ of error and approved a *supersedeas* bond to the supreme court of the State of Kansas, in the

case wherein The State of Kansas on the relation of W. A. Johnston, attorney-general, was plaintiff, and John Foster, county attorney of Saline County, Kansas, was defendant; that a citation had also been signed by said Chief Justice Waite, and that the judgment of ouster rendered by the supreme court of Kansas against John Foster as county attorney of said county had by reason of such proceedings been stayed until said case could be heard in the Supreme Court of the United States; that affiant upon the evening of the 7th day of April, 1884, met the Hon. John H. Prescott, the judge of the district court of Saline County, Kansas, at Salina aforesaid, and then and there notified him of the information above stated, and further stated to said Prescott that he (Baker) was informed that he (Prescott) was going to appoint a county attorney for said Saline County, and expressed surprise at the same to said Prescott, and in substance said to him that he (Baker) understood and the public generally believed that said judgment of ouster was by reason of the above-stated facts stayed, and said Foster was by reason of the above-stated facts the only person who could legally act as said county attorney. Said Prescott replied that he had no official information of such *supersedeas*, and that any person could send such telegrams. Affiant further says that between the hours of half past 10 and 11 o'clock of the night of said 7th day of April, 1884, he learned that said Prescott was in the office of C. W. Banks and Joseph Moore, in said city of Salina, Saline County, Kansas, and about to appoint a county attorney for said county. Affiant immediately went to said Prescott and suggested to him as his personal friend that it would look very badly for him (Prescott) to make such appointment at such an hour of the night, and especially because it was well known in the community that there was intense prejudice existing in the com-

munity between himself (Prescott) and said Foster; and further deponent saith not.

H. D. BAKER.

Subscribed and sworn to before me this 20th day of May, 1884.

[L. S.] E. E. BOWEN,
Notary Public.

Term ends February 14, 1887.

THE STATE OF KANSAS,
County of Saline, ss:

Joseph Sargent being duly sworn according to law, says: That he is and has been for more that a year last past the county clerk of said Saline County and performing the duties thereof.

That on the 7th day of April, 1884, and between the hours of 11 and 12 o'clock of the night of said day, Joseph Moore came to the house of said affiant in the city of Salina, in said county, and there told affiant that he had been appointed by the Hon. John H. Prescott, the Judge of the district court of said county, as county attorney of said county to fill a vacancy; and affiant says that John Foster had been for more than a year the elected and acting county attorney of said county, and said Joseph Moore requested said affiant to go with him to the law office of one C. W. Banks for the purpose of administering the oath of office and approving the bond of said Joseph Moore as such county attorney. That affiant did thereupon go to the said office, and was there presented with a certain paper purporting to be an appointment of said Joseph Moore as such county attorney, made by said Judge Prescott (a copy of which is attached, marked "A.") and affiant did there approve the said

bond and administer the oath of office of said Joseph Moore as such county attorney (certified copies of which are hereto attached, marked "B" and "C.")

Affiant further says that he immediately took said bond and oath to his (affiant's) office in the court huose in said county, and was accompanied by said Joseph Moore, and there deposited the same at two minutes before 12 o'clock of the night of the 7th day of April, A D. 1884, that during the business hours of the forenoon of the 8th day of April, 1884, affiant presented the said bond to the board of county commissioners of said county, stating to said board that he had approved said bond in the sum of $5,000; (a certified copy of the proceedings of said board upon said bond is attached to this affidavit, marked "D.") That said board of county commissioners in no other manner fixed the amount of the said bond, and further affiant saith not.

JOSEPH SARGENT.

Subscribed to in my presence and sworn to before me this 20th day of May, A. D. 1884.

[SEAL.] FRANK FERLEN,
Clerk District Court.

THE STATE OF KANSAS,
Saline County, ss:

It having appeared to me by a record of the supreme court of this State duly authenticated that there is a vacancy in the office of county attorney of this county, I do by the authority of law in such cases made and provided, hereby appoint Joseph Moore, esq., to fill such vacancy.

Done at Salina, Kansas, this 7th day of April, A. D. 1884.

JOHN H. PRESCOTT,
Judge Fourteenth Jud. Dist. of Kansas.

(Indorsed:) Filed this 7th day of April, A. D. 1884. Joseph Sargent, county clerk. (Seal.)

THE STATE OF KANSAS,
Saline County, ss:

I, Joseph Sargent, county clerk of said county and State, do hereby certify that the above and foregoing is a true and correct copy of the original appointment of Joseph Moore as county attorney as filed in my office with all the indorsements thereon.

Witness my hand and official seal this 20th day of May, 1884.

[L. S.] JOSEPH SARGENT,
County Clerk.

B

Know all men by these presents: That Joseph Moore as principal, and Charles G. Wilmarth, Charles S. Radcliff, Charles W. Banks, Harper Cunningham, T. L. Bond, M. D. Sampson and J. F. Wellington, Jr., sureties, are held and firmly bound unto the state of Kansas, in the penal sum of five thousand ($5,000) dollars, good and lawful money of the United States of America, well and truly to be paid without defalcation or discount.

Witness our hands and seals this 7th day of April, A. D. 1884.

The condition of the above obligation is such that, whereas the above-bonded Joseph Moore has this day been appointed to the office of county attorney of the county of Saline and state of Kansas.

Now the condition of this obligation is such that if the said Joseph Moore shall faithfully perform the duties of the said office of county attorney of said County of Saline, and that he will pay over to the county treasurer of said County of Saline, in the manner prescribed by law, all moneys which shall come into his hands by virtue of his office.

JOSEPH MOORE,
CHARLES G. WILMARTH,
CHARLES S. RADCLIFE,
CHARLES W. BANKS,
HARPER S. CUNNINGHAM,
T. L. BOND,
M. D. SAMPSON,
J. F. WELLINGTON, JR.

C

THE STATE OF KANSAS.
County of Saline.

I, Joseph Moore, do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of Kansas, and faithfully discharge the duties of the office of county attorney of the County of Saline and State of Kansas, so help me God.

JOSEPH MOORE.

Subscribed and sworn to before me and in my presence this 7th day of April, A. D. 1884.

JOSEPH SARGENT,
[SEAL.] *County Clerk of Saline County, Kansas.*

(Endorsed:) Bond of Joseph Moore, county attorney. Filed this 7th day of April, A. D. 1884. Joseph Sargent, County Clerk.

This bond is by me Joseph Sargent, County Clerk of Saline County, Kansas, approved this 7th day of April, A. D. 1884.

JOSEPH SARGENT,
[SEAL.] *County Clerk, Saline County, Kansas.*

STATE OF KANSAS,
Saline County, ss:

I, Joseph Sargent, County Clerk of said county and state do hereby certify that the above and foregoing is a true and correct copy of the original bond and oath of office of Joseph Moore, as county attorney, as filed in my office with all the endorsements thereon.

Witness my hand and official seal this 20th day of May, 1884.

JOSEPH SARGENT,
County Clerk.

D.

The county clerk informed the Board of County Commissioners that he had approved the bond of Joseph Moore for $5,000, said Moore having been appointed to fill vacancy in the office of county attorney by Judge J H. Prescott, whereupon the Board said the sum of $5,000 was sufficient.

STATE OF KANSAS,
Saline County, ss:

I, Joseph Sargent, county clerk of said county, do hereby certify that the above and foregoing is a true and

correct copy of all the proceedings of the Board of County Commissioners of said Saline County relating to the bond of Joseph Moore for the office of county attorney of said county, as appears on the record and journal of said commissioners in my office.

Witness my hand and official seal this 20th day of May, 1884.

JOSEPH SARGENT,
County Clerk.

THE STATE OF KANSAS,
County of Saline, ss:

Frank Ferlen, being duly sworn according to law, deposes and says that he is and has been since the 8th day of January, 1883, the clerk of the district court of Saline County, in the State of Kansas, and has been during said time performing the duties of said office.

That the said court is a court of record, and of general jurisdiction in both civil and criminal matters within the State of Kansas; that the 12th day of May, 1884, the same being the first day of the regular term of said court, said court was duly convened, the Hon. John H. Prescott being the sole presiding judge thereof, and upon the opening of the same, John Foster, who had been the county attorney of said county from the 8th day of January, 1883, to that time, and performing the duties of said office of county attorney, appeared in said court and proceeded to perform his duty as such county attorney, but the said court refused to recognize said John Foster as such county attorney and excluded him from performing the duties of county attorney of said county, and in his stead recognized one Joseph Moore as such county attorney, whom the said judge of said court claimed to have appointed on or about the 7th day of April, A. D.

1884, as such county attorney instead of said John Foster; that the trials of three (3) criminal cases have been had in said court under the administration of said Joseph Moore acting as such county attorney under said appointment since the said 12th day of May, 1884; that the records of said proceedings and trials have not yet been made up, said court being still in session.

That certified copies of the writ of error, bond and citation, in the case pending in the Supreme Court of the United States, wherein John Foster, county attorney of Saline County, Kansas, is plaintiff in error, and The State of Kansas on the relation of W. A. Johnston, attorney-general, is defendant in error, were received by affiant by due course of mail from the clerk of the supreme court of Kansas on the 17th day of April, 1884, and were on said date filed in affiant's office, and affiant on the same day notified Judge Prescott that said papers were so filed; that said certified copies show that the originals were filed by said clerk of the supreme court of Kansas on the 8th day of April, 1884.

That said Joseph Moore, claiming to act as said county attorney on the 28th day of April, 1884, filed with said affiant three informations for alleged misdemeanors against various persons a copy of one of which is hereto attached, marked "A"; and further affiant saith not.

FRANK FERLEN.

Subscribed to in my presence and sworn to before me this 20th day of May, A. D. 1884.

JOSEPH SARGENT,
County Clerk.

A.

FIRST COUNT.

In the district court of Saline County, Kansas.

The State of Kansas, plaintiff,
vs.
Gustave Behr and Frederick Barneck, defendants.

Information.

The undersigned county attorney of Saline County, in the State of Kansas, in the name, by the authority and on behalf of the State of Kansas, give information that the said Gustave Behr and Frederick Barneck, late of said county and State, on the 13th day of October, A. D. 1883, in the county of Saline aforesaid, in a certain brick building situated and being on lot numbered ninety-nine (99) on the east side of Santa Fe avenue, in the city of Salina, in said county and State, unlawfully did sell, barter, and give away spiritous, malt, vinous, fermented, and other intoxicating liquors, the said Gustave Behr and Frederick Barneck then and there not having a permit to sell intoxicating liquors as provided by law, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Kansas.

JOSEPH MOORE,
County Attorney.

SECOND COUNT.

And the undersigned county attorney of Saline County, in the State of Kansas, in the name, by the authority, and on behalf of the State of Kansas, give information

that the said Gustave Behr and Frederick Barneck, late of said county and State, on the 20th day of October, A. D. 1883, in the county of Saline aforesaid, in a certain brick building situated and being on lot numbered ninety-nine (99) on the east side of Santa Fe avenue, in the city of Salina, in said county and State, unlawfully did sell, barter, and give away spiritous, malt, vinous, fermented, and other intoxicating liquors, the said Gustave Behr and Frederick Barneck then and there not having a permit to sell intoxicating liquors, as provided by law, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Kansas.

JOSEPH MOORE,
County Attorney.

(Here follows eighteen counts in the same words and figures as the foregoing, excepting the date therein mentioned, and are numbered from 3 to 20, respectively.)

And the remaining portion of said information is as follows:

TWENTY-FIRST COUNT.

And the undersigned county attorney of said county, in the name, by the authority, and on behalf of the State of Kansas, give information that on the 13th day of October, A. D. 1883, and on divers other days and times between that day and the 31st day of December, 1883, the said Gustave Behr and the said Frederick Barneck, in the county of Saline and State of Kansas, did then and there unlawfully keep and maintain a certain common nuisance, to wit: a certain tenement or brick building situated and being on lot numbered ninety-nine (99) on the east side of Santa Fe avenue, in the city of Salina, in said county and State, then and there and said

other days and times, then by him, the said Gustave Behr, and by him, the said Frederick Barneck, kept and used for the illegal selling, bartering, and giving away and the illegal keeping for sale barter and use of intoxicating liquors in violation of the provisions of an act of the Legislature of the State of Kansas entitled "An act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes," approved February 19, 1881. He, the said Gustave Behr, and he, the said Frederick Barneck, then and there not having a permit to sell intoxicating liquors as provided by law, to the common nuisance of all good citizens of the State of Kansas, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Kansas.

JOSEPH MOORE,
County Attorney.

STATE OF KANSAS,
Saline County, ss:

I do solemnly swear that the allegations set forth in the within information, and each and every count thereof, are true to the best of my knowledge and belief, so help me God.

JOSEPH MOORE,
County Attorney.

Subscribed and sworn to before me this 23d day of April, 1884.

[SEAL.]

FRANK FERLEN,
Clerk District Court.

STATE OF KANSAS,
County of Saline, ss:

I, Frank Ferlen, clerk of the district court in and for the county and State aforesaid, do certify that the above and foregoing is a true, correct and complete copy of the original "Information" in the cause of The State of Kansas vs. Gustave Behr and Frederick Barneck, as the same now remaining on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, this 20th day of May, A. D. 1884.

[SEAL.] FRANK FERLEN,
Clerk District Court.

112-201

Office Supreme Court U. S.
FILED.
OCT 14 1884
JAMES. H. McKENNEY.
CLERK.

SUPREME COURT OF THE UNITED STATES.

October Term, 1883.

No. 1056

JOHN FOSTER, Plaintiff in Error,

vs.

THE STATE OF KANSAS, ON THE RELATION OF W. A. JOHNSTON, ATTORNEY-GENERAL, Defendant in Error.

BRIEF FOR PLAINTIFF.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

In the Supreme Court of the United States.

JOHN FOSTER

vs.

STATE OF KANSAS.

Brief in opposition to motion to dismiss or affirm.

An action of quo warranto was brought by the attorney-general of the State, in the name of the State, to remove the plaintiff in error from the office of county attorney, on the ground that he had refused to prosecute certain parties for violation of the prohibitory liquor law of the State. The action was instituted in the State Supreme Court.

The plea and answer deny that the defendant had neglected to perform any of the duties legally devolving upon him as county attorney.

That the offenses charged in the petition against him were certain pretended duties cast upon him by the law of 20th February, 1881, and under no other law.

"That the said act of the State of Kansas is contrary to the Constitution of the United States and the laws passed in pursuance of said Constitution; that the said act is, for the foregoing cause, null and void, and that no legal duty was cast upon the defendant by its provisions." (R.)

There was a verdict in favor of the plaintiff. The defendant thereupon moved for a new trial. Among the grounds for the motion were, "that he had been tried for an alleged offense under a statute of Kansas, which is repugnant to and contrary to the Consitution and laws of the United States and the State of Kansas."

In addition, it is alleged "that this action and the course of trial had been in defiance of the rights of the defendant, guaranteed to him by the Constitution of the United States." (R.)

The new trial was refused, and a judgment rendered that the defendant be ousted from his office. (R.)

Thereupon the defendant presented his bill of exceptions. This recites:

"Be it remembered, that in the above-entitled action, on the first appearance of the defendant therein and at the proper time, the defendant, as to and upon the charge alleged against him in the petition filed in the above action, demanded of the supreme court of the State of Kansas that he be tried in the county of Saline, in the State of Kansas; that he demanded the selection and impanelling of a jury drawn and chosen from Saline county, with the right to four peremptory challenges; that he demanded the right of compulsory process for his witnesses, and to meet them face to face; that he demanded the right to introduce evidence of good professional character and reputation, which evidence he had ready before the court to produce and use upon the trial; that he demanded the right to the reasonable doubt on the consideration of the evidence by the jury in the determination of their verdict. The defendant then and there claimed, under all of said demands, that it was a criminal charge which was alleged against him in the petition, and he insisted that the rights, privileges, and immunities which he claimed from the court were given him as a citizen of the State of Kansas, and especially as a citizen of the United States, under the Constitution of the United States; that the supreme court of the State of Kansas refused to dismiss the action, and retained jurisdiction of the same; that it decided that the petition alleg d a civil action only against the defendant; that it was a civil action, and not a criminal action; refused to permit or direct his trial to be held in Saline county; refused to permit the case to be tried there; that said court held the same for trial as a civil action, and completed the action as such; that the defendant was refused a jury from Saline county; that the defendant was refused compulsory process for his witnesses; that he was refused the right to meet his witnesses face to face." * * * (R.)

The bill of exceptions also assigned as error the overruling

of the constitutional objections to the action and trial, which we have already adverted to.

The syllabus to the opinion prepared by the court, states:

"The provisions of the prohibitory act referred to in the charge of the court, and the section thereof commented upon in this opinion, held not to be in conflict with the Constitution of the United States or the laws passed in pursuance thereof."

In the opinion itself it is said: "In our opinion there is no provision of the prohibitory act referred to in the charge or involved in this case violative of the Constitution or of any act of Congress." (R.)

The bill of exceptions concludes: "The defendant, by this bill of exceptions, alleges that he desires to preserve and present two questions which he claims arise under the Constitution of the United States: First, was the defendant entitled to a criminal trial under and by the established course of the criminal law of the State of Kansas? Second, are the sections of the statute of the State of Kansas set up in the fourth answer of the defendant, which were referred to and commented upon in the charge of the court to the jury, and in the opinion of the court denying the motion for a new trial, repugnant to the Constitution of the United States? The court decided the defendant was not entitled to be tried in accordance with the criminal code of procedure, and the court further decided that the sections of the statute set up in the fourth defense of the defendant's answer were not repugnant to the Constitution of the United States."

The bill of exceptions is thus verified: "The foregoing bill of exceptions having been presented to the judges of the supreme court, and the same having been examined by said judges, is found and declared by them to be true." (R.)

A writ of error was allowed the defendant by Mr. Chief-Justice Waite on April 5, 1884.

We have been thus particular in setting forth the pleadings, in order that the court may perceive that the defenses asserted by the defendant, under the Constitution of the United States, were asserted by him from first to last, and that the court below sustained the validity of the State law and the proceedings, and overruled the defenses so set up.

It is clear, therefore, that the case is one for the revisory jurisdiction of this court.

The jurisdiction of this Court over the judgments of the highest courts of a State is not to be avoided by the mere absence of reference to some particular provision of the Federal Constitution. Wherever rights, acknowledged and protected by that instrument are denied or evaded under the shield of State legislation, this court is authorized to interfere. The form and mode in which the Federal question is raised in the State court is of minor importance, if, in fact, it was raised and decided. Nothing is said in the act of 1867, sec. 709, R. S., respecting the mode in which it shall be made to appear.

Murray *v.* Charleston, 96 U. S., 441.

Nor is it necessary to point out the special provision of the Constitution on which a party relies.

If a plaintiff or defendant in their pleadings make a case which necessarily comes within some of the provisions of that instrument, this Court can surely recognize the fact without requiring the pleader to say in words, "this paragraph of the Constitution is the one involved in this case."

Bridge Proprietors *v.* Hoboken, 1 Wall., 116.

It is urged in the brief on motion to dismiss that even if a Federal question was decided, the judgment can be sustained on grounds non-Federal.

It is manifest that the Court below could not have rendered the judgment against the defendant, unless by overruling the defenses set up by him under the Constitution of the United States.

Moreover, it is denied that the suit could rest upon any other

act than that known as the prohibitory act. Whether this is true or not must necessarily be decided by this Court for itself, when it comes to decide the case.

A motion is also made to affirm the judgment, on the ground that the Federal question involved is frivolous, and that the writ of error is brought for delay.

The whole of the record disproves this allegation. It shows that the writ of error has been *bona fide* prosecuted to invoke the opinion of this Court on important questions arising under the Constitution of the United States. Their decision calls for the careful consideration of the Court and discussion at the bar.

The first section of art. 14 of the Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

These guarantees of the Constitution, plaintiff in error will maintain, were violated by the law of the State, the validity of which the court sustained, and in the proceeding now brought up for review, in which the defendant was denied the right and privilege set up and claimed to a trial by an impartial jury within the county and district wherein the offense charged was committed. He was denied the right to be confronted with witnesses, and the right to a trial by jury for a criminal offense according to the due course of law.

How far these rights and similar rights are protected by the fourteenth amendment is a grave question. Counsel are informed that cases involving its determination are now pending before your Honors.

It is submitted that the motion should be denied.

W. HALLETT PHILLIPS,
For Plaintiff in Error.

112-201

1056

UNITED STATES OF AMERICA.

IN THE SUPREME COURT.

JOHN FOSTER,
Plaintiff in Error,

vs.

THE STATE OF KANSAS, EX REL., W. A. JOHNSTON, ATTORNEY GENERAL,
Defendant in Error.

On motion to dismiss the writ of error, united with motion to affirm.

BRIEF FOR DEFENDANT IN ERROR.

GARVER & BOND,
Of Counsel for the State.

DARLING, COATES & JOHNSTON, PRINTERS, TOPEKA.

UNITED STATES OF AMERICA.

IN THE SUPREME COURT.

JOHN FOSTER,
Plaintiff in Error,
vs.
THE STATE OF KANSAS, EX REL., W. A. JOHNSTON, ATTORNEY GENERAL,
Defendant in Error.

On motion to dismiss the writ of error, united with motion to affirm.

Brief of Garver & Bond for Defendant in Error.

This was an action of *quo warranto* to remove the plaintiff in error from the office of County Attorney of Saline County, Kansas, on the ground that he had forfeited his office by wilful failure and neglect to perform the duties of his office. The specific duty alleged to have been so neglected, was the failure to prosecute certain persons guilty of violating the prohibitory liquor law of Kansas. Trial by jury was had, and judgment of removal from office rendered, by the Supreme Court of that State.

In his answer, the defendant alleged that the prohibitory liquor law pretended to cast upon him the duties charged to have been neglected, and averred that said statute "is contrary to and against the Constitution of the United States of America, and the laws passed in pursuance of said Constitution."

A jury trial was demanded, and the Court, *ex gratia*, gave him a trial by jury, in accordance with the forms of trial prescribed by the code in civil actions.

By the bill of exceptions, two questions are preserved and presented, which, it is claimed, arise under the Constitution of the United States. They are :—

FIRST. "Was the defendant entitled to a criminal trial as aforesaid, under and by the established course of the criminal law of the State of Kansas?"

SECOND. "Are the sections of the statute of the State of Kansas set up in the fourth answer of the defendant, which were referred to and commented upon in the charge of the Court to the jury, and in the opinion of the Court denying the motion for a new trial, repugnant to the Constitution of the United States?

The record does not show that any claim was made to the Court during the progress of the trial, that any special provision of the Constitution was violated, or that the Court was called upon to pass upon any such provision, until upon the argument of the motion for a new trial. Then, for the first time, it was claimed that the provisions of section one of the 14th amendment were violated by the section of the statute in question. That section, being 12 of the prohibitory law, after providing for notice to the County Attorney by sheriffs and other officers, who may know of violations of the law, provides, as regards the County Attorney, as follows :

"If the County Attorney of any county shall be notified by any officer or other person, of any violation of any of the provisions of this act, it shall be his duty forthwith to diligently inquire into the facts of such violation, and if there is reasonable ground for instituting a prosecution, it shall be the duty of such County Attorney to file a complaint in writing before some court of competent jurisdiction, charging the suspected person of such offense, and shall verify such complaint by affidavit, but it shall be sufficient to state in such affidavit that he believes the facts stated in such complaint to be true. If any County Attorney shall fail or refuse to faithfully perform any duty imposed upon him by this act, he shall be deemed guilty of a misdemeanor, and on conviction thereof in the district court shall be fined in any sum not exceeding five hundred dollars, and on such conviction shall be deemed to be removed from office. If in any prosecution begun by the County Attorney under the provisions of this section there shall be a failure to convict, the proper costs of such prosecution shall be paid by the county in which such prosecution was begun. It shall be the duty of the County Attorney, under penalty of forfeiture of his office, to prosecute any and all persons guilty of any violation of the provisions of this act; and for each successful prosecution he shall be allowed a fee of fifteen dollars, which shall be taxed as costs in the case, but the county shall in no case be liable therefor. The County Attorney shall bring suit upon all bonds forfeited under the provisions of this act immediately upon the happening of such forfeiture, to recover the penalty thereof; and all monies collected thereon shall be paid into the school fund of the proper county. The County Attorney shall be allowed a fee of ten per cent. upon all monies so collected by him, to be paid out of the same."

The motion to dismiss the writ of error is based upon three grounds:

1. "It does not appear from the record that the constitutionality of the sections of the statute, referred to and commented on by the Court, was necessarily drawn in question, or that the decision of the Court was based upon their not being repugnant to the constitution of the United States."

2. "The record does not show that plaintiff in error, in the Supreme Court of Kansas, set up any special right under, or that he claimed that the particular sections of the statute referred to were repugnant to, any special provision of the Constitution of the United States."

3. "The record does not show that the Supreme Court of Kansas was called upon to consider, or that it decided as to the validity of the statute under, any special provision of the Constitution of the United States."

First. The duty of a County Attorney to prosecute for violations of this law does not arise simply out of the section of the statute in question. Sec. 136 of Chap. 25 of General Statutes of Kansas provides: "It shall be the duty of the County Attorney to appear in the several courts of their respective counties, and prosecute or defend, on behalf of the people, all suits, applications or motions, civil or criminal, arising under the laws of this State, in which the State, or their county, is a party or interested." This statute was referred to by the Court in its charge to the jury. Without regard to section 12 of the prohibitory law, it was his duty to prosecute. And upon a neglect or failure so to do, he forfeited his office, and could be removed therefrom by civil action. Such removal is also provided for independently of this particular statute. Sec. 180, Chap. 25 of General Statutes of Kansas.

Hence, we say, that the decision of the Court in this case must stand though said section 12 be stricken from the statute. The judgement does not rest upon it, nor upon the violation of any duty which was created exclusively by it. This Court will not entertain jurisdiction if it appears that, besides the federal question decided by the State Court, there is another and distinct ground on which the judgement can be sustained, and which is sufficient to support it.

Steines v. Franklin County, 14 Wall., 15.

Kennebec Railroad v. Portland Railroad, Id., 23.

Klinger v. State of Missouri, 13 Wall., 257.

Citizens Bank v. Board of Liquidation, 98 U. S. 140.

SECOND. In his answer the defendant alleged the unconstitutionality of the prohibitory liquor law as an entirety. Such a claim, at this day, was too glaringly frivolous to be urged upon the Court. Upon the argument of the motion for a new trial, one section out of the twenty-four which compose the act, was singled out, and the claim made that it is repugnant to the 14th amendment to the Constitution. No such question was presented by the pleadings, nor considered by the Court. Defendant neither claimed that this particular section was unconstitutional, nor did he point out in any way any special provision of the Constitution which was violated.

In order to give jurisdiction to this Court, it must appear by the record that the point relied upon was made in the State Court, and that the section of the statute claimed to be invalid, and the provision of the Constitution invoked were brought to the notice of the State Court.

Maxwell v. Newbold 18 How., 511.

Hoyt v. Thompson's Executors, 1 Black, 518.

Worthy v. The Commissioners, 9 Wall., 611.

The fact that on motion for a new trial, it was claimed that section 12 was repugnant to the 14th amendment, can make no difference. Many considerations, other than the constitutional question, may justify a court in overruling a motion for a rehearing. The action of the court is then largely discretionary. But even the written motion for a new trial did not present to the Court the question now relied upon.

Jurisdictional questions cannot properly be introduced for the first time on a motion for rehearing.

Steines v. Franklin County, 14 Wall., 15.

THIRD. Assuming, for the time, that the constitutional question could be presented as the record shows, and that the judgement rests only upon the validity of said section 12, still, we may ask, what question did the State Court consider and pass upon? Did defendent claim that said section abridges his privileges and immunities as a citizen of the United States? His answer does not allege that he is a citizen of the United States. Did he claim that this office was his property of which he was being deprived without due process of law? He took the office from the hands of the legislature, under these preimposed conditions, and, without regard to this statute, he forfeited his office and was removable for neglect of official duty. Did he complain that this statute denied him that equal protection of the law which others enjoyed under like circumstances? What the State Court decided, and whether this Court shall pass upon the same question, is matter of mere conjecture.

We maintain, therefore, that no federal question was presented to and decided by the State Court which gives

this Court jurisdiction. The first question presented, as to the right of the defendant to a criminal trial under and by the established course of the criminal law of Kansas, of course, suggests nothing for this Court to review.

ON MOTION TO AFFIRM.

If the Court should be of opinion that the record shows that it has jurisdiction, then we ask for an affirmance of the judgement. The application of the 14th amendment to such State legislation as that involved here is well settled. The first clause of section one has no reference to the demands which a State may make of its officers, nor to the duties and penalties imposed upon them. This Court has construed that clause as referring to rights enjoyed by one in his capacity of a citizen of the United States, as distinguished from his rights as a citizen of the State.

Slaughter House Cases, 16 Wall., 36.

The office of County Attorney, with its privileges and emoluments, is not property within the meaning of that term in the second clause of said section one. If property, then it is enjoyed only because of previous legislative action, creating the office for certain purposes, to be held on certain conditions. No question can be made as to the right to deprive of an office so created, by the methods prescribed by the creating power. Neither can it be said that the defendant did not have the equal protection of the laws. Of necessity there must be some difference between the duties, rights and liabilities of different classes of officers. The defendant voluntarily stepped into the class of County Attorneys, and can claim no greater privileges under the law than are provided for that class of officers.

Everything that can be said in favor of the proposition advanced by plaintiff in error, we think, has been fully settled by this Court in Missouri v. Lewis, 101 U. S., 22. It is there held, that the 14th amendment to the Constitution of the United States does not inhibit the States from prescribing their own modes of judicial proceeding. Forms of trials are matters purely for State regulation. The Constitution of the United States simply guarantees that every person shall have the same legal protection that others enjoy under like circumstances. These questions being so well settled that they do not even challenge argument, the judgement should be affirmed.

Nickerson et. al. v. Steamship Co., 105 U. S., 404.

Evans v. Brown, 109 U. S. 180.

Respectfully submitted by

GARVER & BOND,

Of Counsel for the State.

A. L. Williams
for the State

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 57.

THE COUNTY OF BUENA VISTA, IN THE STATE OF IOWA, PLAINTIFF IN ERROR,

vs.

THE IOWA FALLS AND SIOUX CITY RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED OCTOBER 8, 1881.